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# How to Improve Empirical Desert

Adam J. Kolber<sup>†</sup>

*According to empirical desert advocates, lay moral intuitions are consistent with retributive approaches to punishment, and policymakers can increase compliance with criminal justice policies by punishing in accord with those intuitions.*

*I offer three challenges to empirical desert intended ultimately to strengthen its theoretical underpinnings: First, advocates have cherry-picked certain moral intuitions, while ignoring others. Second, they have yet to demonstrate the weight to assign the compliance induced by empirical desert relative to the weight of other consequentialist considerations. Third, empirical desert arguably exploits laypeople by using their “mistaken” beliefs about punishment to encourage their compliance with consequentialist goals. Such exploitation may trouble defenders of the “publicity condition,” which requires that a system of morality be based on principles that can be announced publicly without thereby undermining those same principles.*

*I do not describe precisely how empirical desert advocates should respond to these concerns, but they will make substantial headway by more carefully distinguishing the use of widely-shared moral intuitions to make predictions about people’s behavior from the use of those intuitions to justify particular policies. (This article was written for the Brooklyn Law School Symposium, “Is Morality Universal, and Should the Law Care?”.)*

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## INTRODUCTION

Moral and legal theorists often make claims about our widely-shared intuitions. These intuitions are treated like stars in the sky. Theorists draw constellations around the stars to more or less capture their locations and make the connections between them seem sensible, elegant, and sometimes even beautiful.

In one such effort, researchers have sought to systematically gather empirical data about our punishment intuitions. Paul Robinson, John Darley, and others have argued that we share certain deep intuitions about punishment that are surprisingly consistent across people of different ages, geographies, and cultures.<sup>1</sup> Calling the project “empirical desert,” these researchers argue that our criminal justice policies and practices should reflect our widely-shared intuitions. When people see that the law reflects their deep, intuitive commitments, they are more likely to recognize its legitimacy and comply with its obligations. Most punishment theorists have paid little attention to the ways in which people’s perceptions of the law’s legitimacy can affect their willingness to comply with it. Empirical desert helps to remedy this deficiency.

In this symposium article, however, I offer three challenges to empirical desert intended ultimately to strengthen its theoretical underpinnings. The first is the “cherry-picking” challenge. Although empirical desert purports to examine our intuitions objectively, in fact, advocates focus only on certain intuitions. In particular, they focus on intuitions that are elicited at a particular level of abstraction in ways that hide some of our more passionate intuitions that, for better or worse, motivate many people. The second is the “significance” challenge. I note that empirical desert advocates have yet to show how much compliance empirical desert can induce. Absent such information, we do not know if there are good consequentialist grounds for adopting potentially costly empirical desert policies. The third is the “exploitation” challenge. Laypeople justify punishment in retributive terms

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<sup>1</sup> See Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 8-10 (2007) [hereinafter Robinson & Darley, *Intuitions of Justice*]; *infra* Part II.A. Of course, lots of intuitions do vary by race, gender, and other variables. See, e.g., Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1880-83 (2007) [hereinafter Robinson & Kurzban, *Concordance and Conflict*].

while empirical desert advocates justify punishment in consequentialist terms. One might argue that empirical desert exploits laypeople by using their “mistaken” retributive intuitions to encourage their compliance with consequentialist goals. Such exploitation arguably violates the “publicity condition,” which requires that a system of morality be based on principles that can be announced publicly without thereby undermining those same principles.

In Part I, I discuss, in general terms, the use of moral intuitions to make *predictions* about people’s behavior and the very different use of moral intuitions to *justify* some policy. In Part II, I present the three challenges to empirical desert that I just described. I show how empirical desert generally uses intuitions in the less controversial predictive mode but sometimes slips illicitly into the justificatory mode. By being more attuned to the differences between prediction and justification, empirical desert can rest on a sturdier foundation.

#### I. PREDICTION VS. JUSTIFICATION

Widely-shared moral intuitions might be thought relevant to the law in two different ways. In the “predictive mode,” widely-shared moral intuitions help us predict people’s likely reactions to laws and other policies that implicate those intuitions. For example, if most voters share the intuition that it is immoral to use some new military technology, then we might plausibly predict that voter support for a war will decline if military leaders begin to use the technology. Policymakers might decide that, even though the technology presents a cost-effective method of achieving military objectives, given public sentiment, the war effort would be better promoted by refraining from using the new technology than by using it. In other words, when engaging in cost-benefit analysis, among the many costs to consider are the costs associated with taking actions that violate people’s deeply-held intuitions.

In the predictive mode, our widely-shared moral intuitions do not justify our actions. Our intuitions merely give us information that we can use to better achieve societal goals that we have settled on for other reasons. In the previous example, opposition to a new military technology tells us something about how to prosecute a successful military action, even if it tells us little in any deep sense about the morally appropriate conditions for using the technology. To the extent

that legal theorists and policymakers examine widely-shared moral intuitions in the predictive mode, they may well achieve their goals. We may disagree about the accuracy of any particular predictions said to be rooted in findings about our intuitions, but given the ends of the predictive approach, the basic methodology is sound.

A second, more controversial way in which intuitions may be relevant to the law occurs in the “justificatory mode.” In this mode, we use intuitions not to predict behavior but to justify moral claims. We cannot easily or automatically determine that some moral intuition is justified, however, simply because it is widely held. For example, even if a majority of voters believe that it is immoral to permit people of the same sex to marry each other, we might resist the idea that such intuitions alone, even if they represent a consensus view, provide *any* moral support for prohibiting same-sex marriage.

On the other hand, widely-shared intuitions may be relevant to justification when they fit together with other intuitions and with deeper moral principles. For example, most people share the intuition that, absent unusual circumstances, it is wrong to intentionally kick a sleeping dog. This intuition is consistent with many other widely-shared intuitions about the impermissibility of causing unnecessary harm. Perhaps we can provide some justification for the belief that it is wrong to kick a sleeping dog by noting that virtually everyone thinks so and that such intuitions cohere with other intuitions and with deeper moral principles.

If morality ultimately depends on empirical facts about the world, as many theorists believe,<sup>2</sup> then justifications of moral claims will likely depend on certain facts about human psychology and social interaction, including, perhaps, our widely-shared moral intuitions. If facts about our intuitions truly are relevant to justification, then the law ought to care about those intuitions in order to develop morally appropriate laws. Either way, it is much more difficult to make use of intuitions in the justificatory mode than in the predictive mode because there is considerable disagreement about precisely how

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<sup>2</sup> See, e.g., Owen Flanagan, Hagop Sarkissian & David Wong, *Naturalizing Ethics*, in *MORAL PSYCHOLOGY: THE EVOLUTION OF MORALITY* (Walter Sinnott-Armstrong ed., 2008); cf. John Mikhail, *Universal Moral Grammar: Theory, Evidence, and the Future*, 11 *TRENDS COGNITIVE SCI.* 143 (2007) (arguing that we share certain fundamental moral intuitions that may, like language, have a largely innate grammatical structure).

we ought to resolve conflicting intuitions when seeking to justify interesting moral claims. As I illustrate in the next section, by keeping the distinction clear between the predictive mode and the justificatory mode, we can better understand what it is that empirical desert advocates are trying to do.

## II. CHALLENGES TO EMPIRICAL DESERT

### A. *Empirical Desert Overview*

#### 1. Two Consistent Findings

Advocates of empirical desert advance two claims in particular about lay punishment intuitions. First, they argue that lay punishment intuitions are best explained by the view that offenders should be punished according to their desert. According to Paul Robinson and Robert Kurzban, “empirical studies confirm a nearly universal human intuition that serious wrongdoing deserves punishment.”<sup>3</sup> Desert considerations purportedly have much more impact on lay punishment intuitions than considerations about deterring future crime and incapacitating dangerous people.<sup>4</sup> In more theoretical terms, empirical desert advocates say that lay intuitions are better explained by retributive rather than consequentialist punishment principles.<sup>5</sup>

Second, advocates claim that laypeople have surprisingly consistent intuitions about the ordinal ranking of the gravity of crimes.<sup>6</sup> Laypeople seek to punish murderers more than burglars and burglars more than prostitutes. While laypeople may not agree on the appropriate sentence for burglary in absolute terms, they will frequently agree on the relative seriousness of burglary compared to other common

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<sup>3</sup> Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1, at 1848.

<sup>4</sup> See, e.g., Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 295-97 (2002).

<sup>5</sup> *Id.* at 296-97; see also Kevin M. Carlsmith, *On Justifying Punishment: The Discrepancy Between Words and Actions*, 21 SOC. JUST. RES. 119 (2008); Kevin M. Carlsmith & Avani Mehta Sood, *The Fine Line Between Interrogation and Retribution*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 191, 195 (2009) (providing some evidence that our intuitions about the use of harsh interrogation tactics are also largely retributive).

<sup>6</sup> See Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1, at 1856-61.

crimes.<sup>7</sup> These intuitions also appear to be cross-cultural.<sup>8</sup> Robinson and Kurzban think the evidence of cross-cultural consistency “support[s] the view that people everywhere share intuitions of justice about the relative blameworthiness of serious wrongdoing.”<sup>9</sup> Even young children have proportional punishment intuitions.<sup>10</sup> Thus, like most retributivist theorists, laypeople seem to believe both that punishment should be distributed to those who deserve it and that it should be distributed in proportion to an offender’s blameworthiness.

## 2. The Compliance Claim

The preceding results are interesting in their own right as findings about human psychology. They enter current debates about sentencing policy, however, by way of an additional claim prominently made by Paul Robinson and John Darley. I call it the “compliance claim.” According to Robinson and Darley, a theory of punishment distribution “that tracks the community’s perceived principles of justice has a greater power to gain compliance with society’s rules of lawful conduct.”<sup>11</sup> In other words, they suggest, if people find a legal regime to be just, then they are more likely to comply with it.<sup>12</sup> Moreover, people are more likely to tolerate deviations from

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<sup>7</sup> See Paul H. Robinson, *Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 29, 33 (Paul H. Robinson, Stephen P. Garvey & Kimberly Ferzan eds., 2009) [hereinafter Robinson, *Empirical Desert*] (“The level of agreement is strongest for those core wrongs with which the criminal law primarily concerns itself—physical aggression, taking property, and deception in exchanges—and becomes less pronounced as the nature of the offenses moves further from the core of wrongdoing.”).

<sup>8</sup> See Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1, at 1862-65.

<sup>9</sup> *Id.* at 1862.

<sup>10</sup> Norman J. Finkel, Marsha B. Liss & Virginia R. Moran, *Equal or Proportionate Justice for Accessories? Children’s Pearls of Proportionate Wisdom*, 18 J. APPLIED DEVELOPMENTAL PSYCHOL. 229, 241 (1997) (finding that “by grades 2-3, [children] are making proportionate judgments of culpability and handing out proportionate punishments to all defendants” in mock scenarios).

<sup>11</sup> Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 474 (1997) [hereinafter Robinson & Darley, *Utility of Desert*]. H.L.A. Hart made a similar point in H.L.A. HART, LAW, LIBERTY, AND MORALITY 36-37 (1963) (“There are many reasons why we might wish the legal gradation of the seriousness of crimes, expressed in its scale of punishments, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utilitarian grounds: it might either confuse moral judgments or bring the law into disrepute, or both.”).

<sup>12</sup> See Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 25-28. Robinson and Darley cite, in particular, the work of Tom Tyler. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57-68, 170-173 (2006).

their expectations of how the criminal justice system should work when they believe that the system, as a general matter, is consistent with their intuitions. According to Robinson and Darley, “the criminal law can only hope to . . . have people follow its rules in ambiguous cases if it has earned a reputation as an institution whose focus is morally condemnable conduct and is seen as giving reliable statements of what is and is not truly condemnable.”<sup>13</sup>

Robinson and Darley defend a set of punishment practices based on a view they call “empirical desert.” According to this view, we should arrange our criminal laws and sentencing policies to reflect the intuitions of laypeople.<sup>14</sup> By so doing, we will reduce criminal behavior by encouraging compliance with laws that are perceived as fair and just. If the law “develop[s] a reputation as a reliable statement of existing norms, people will be willing to defer to its moral authority in cases where there exists some ambiguity as to the wrongfulness of the contemplated conduct.”<sup>15</sup> For these reasons, Robinson and Darley have argued that investigation into our moral intuitions should play an important role in the formation of criminal justice policies.<sup>16</sup>

Interestingly, the argument in favor of empirical desert is consequentialist.<sup>17</sup> Robinson and Darley defend empirical desert on the ground that it will promote compliance with the law, not on the ground that doing so is a deontologically justified approach to punishment.<sup>18</sup> In fact, they acknowledge

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<sup>13</sup> Robinson & Darley, *Utility of Desert*, *supra* note 11, at 477; *see also* Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 153 (2008) [hereinafter Robinson, *Competing Conceptions*] (“Liability and punishment rules that deviate from a community’s shared intuitions of justice undercut” the law’s reputation “for accurately assessing from the community’s view what does and does not deserve moral condemnation.”).

<sup>14</sup> *See* Robinson, *Competing Conceptions*, *supra* note 13, at 149.

<sup>15</sup> Robinson & Darley, *Utility of Desert*, *supra* note 11, at 474.

<sup>16</sup> Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 4.

<sup>17</sup> *See* Robinson & Darley, *Utility of Desert*, *supra* note 11, at 456.

<sup>18</sup> Robinson, *Empirical Desert*, *supra* note 7, at 29 (“[P]eople’s shared intuitions about justice are not justice, in a transcendent sense. People’s shared intuitions can be wrong.”). In their early writing on empirical desert, Robinson and Darley may have suggested that community intuitions do bear on deontological justification. *See* Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 638 n.14 (2000). Ken Simons notes that community values are at least indirectly related to deontological justification “[b]ecause our knowledge of moral principles is fallible” and “modesty counsels in favor of respecting lay opinions.” *Id.* at 640. Overall, though, Simons finds that the “relevance of community views to retributive principles is complex and uncertain.” *Id.*



quite straightforwardly that their “arguments for a desert-based system are blatantly utilitarian.”<sup>19</sup> Thus, Robinson and Darley make use of empirical findings about moral intuitions in the predictive mode. They use widely-shared moral intuitions to predict and, perhaps someday, manipulate human behavior in order to achieve what they take to be good consequentialist outcomes. Assuming that the compliance claim is true and that we share their goals, Robinson and Darley describe a plausible way of being a good consequentialist.

Notice that empirical desert advocates do not seem to be claiming that widely-shared desert intuitions serve in any direct way to *justify* our practices. Given their self-professed commitment to consequentialism, at some level, they presumably believe that our desert intuitions are mistaken (or at least that they fail to serve as a sufficient justification for punishment). Otherwise, it is not clear why they are consequentialists. If Robinson and Darley can provide any justification for their use of widely-shared intuitions, they can do so by claiming that these intuitions enable them to make *predictions* about compliance that further their underlying consequentialist approach to punishment. Their consequentialist commitments presumably have some other justification that is independent of the intuitions they study empirically.

### B. *Three Challenges*

According to traditional principles of justification, the rightness or wrongness of an action is independent of people’s beliefs about the action’s moral status.<sup>20</sup> The mere fact that a person believes that some action is morally permissible or impermissible is irrelevant to its moral status unless we have some further reason to think that the person’s belief is likely to be correct. So the naked moral intuitions that social scientists elicit have little normative force unless they fit together in some framework that justifies those intuitions. Merely

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<sup>19</sup> Robinson & Darley, *Utility of Desert*, *supra* note 11, at 456.

<sup>20</sup> Cf. Mary Sigler, *The False Promise of Empirical Desert*, in CRIMINAL LAW CONVERSATIONS, *supra* note 7, at 39, 39 (stating that deontological desert is “[c]onceptually indifferent to people’s intuitions about justice”); Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 324 (1996) (“[E]ven knowledge that the community resoundingly disfavors a particular legal formulation should usually be irrelevant to deserts analysis.”).

averaging the intuitions of lots of people will not justify the intuitions. By way of rough analogy, when deciding what color to paint an apartment, you might be persuaded by the reasons suggesting blue or the reasons suggesting red. But it would be silly to simply average the wavelengths of red and blue and paint the apartment yellow, as there may be no reasons at all to support that approach.

Similarly, merely aggregating people's punishment intuitions tells us little, if anything, about the deontological justification for crafting policies consistent with those intuitions. After all, people's lay intuitions can be wrong. So Robinson and Darley must be careful not to suggest that people's aggregated intuitions provide (non-consequentialist) justifications for punishment. Unfortunately, prominent explications of empirical desert sometimes blur the distinction between prediction and justification. In the next section, I will argue that, although empirical desert principally operates in the predictive mode, it picks-and-chooses from among our intuitions in ways that seem to slip into the justificatory mode.

### 1. Cherry-Picking Challenge

Empirical desert advocates frequently claim to capture laypeople's "intuitions of justice."<sup>21</sup> Indeed, much of the rhetorical appeal of empirical desert is that it purports to capture such intuitions. According to the cherry-picking challenge, however, it is more accurate to say that empirical desert seeks to capture only particular *aspects* of our punishment intuitions.

Such selectivity would be perfectly appropriate if only certain intuitions can be used to promote compliance. But empirical desert advocates have yet to show why the particular intuitions they examine are the ones most likely to help us improve compliance. Rather, they often screen out certain intuitions in ways that seem designed to promote more deontologically-justified policies. In so doing, they seem to shift into a justificatory mode that imports non-consequentialist values and undermines empirical desert's consequentialist foundations.

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<sup>21</sup> See, e.g., Robinson & Darley, *Intuitions of Justice*, *supra* note 1. The expression is also used in the title of Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1.

The first way that Robinson and Darley pick-and-choose pertinent intuitions is by focusing on intuitions elicited at a certain level of particularity. They explore lay intuitions using brief hypothetical scenarios that contain a few facts about a fictitious crime and then ask people to assess a perpetrator's level of blame.<sup>22</sup> Such intuitions, posed at this intermediate level of abstraction, do tend to reflect retributive sentiments.

But we could also query people's intuitions at a more abstract level. As Kevin Carlsmith has noted, even if people's intuitions about appropriate punishment in particular cases tend to be better explained by retributive notions of punishment, when asked about the general goals of a punishment system, laypeople frequently list consequentialist aims like deterrence and incapacitation.<sup>23</sup> We can reasonably conclude from such findings that people's intuitions of justice support consequentialism in some ways and retributivism in others. People's intuitions of justice are not univocally retributive.

Nevertheless, Robinson and Darley focus on the intuitions laypeople express when engaging in acts of mock sentencing while mostly ignoring their intuitions when contemplating the broader goals of sentencing. Though we have consequentialist intuitions about the broad purposes of punishment,<sup>24</sup> Robinson and Darley would permit few exceptions to desert-based punishment distributions.<sup>25</sup> Thus, rather than systematically gathering up widely-shared

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<sup>22</sup> Here is a sample scenario:

John is knocked down from behind by a man with a knife who moves to stab him. As the man lunges for him, John stabs him with a piece of glass he finds on the ground, which is the only thing he can do to save himself from being killed. The man later dies of his injuries.

Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1, at 1894. For other examples, see *id.* at 1894-1900, 1902-04; PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 229-81 (1995).

<sup>23</sup> Carlsmith, *On Justifying Punishment*, *supra* note 5, at 134-36; Robinson, *Empirical Desert*, *supra* note 7, at 35 (noting that subjects "explicitly endorse deterrence justifications for punishment," even though "they actually meted out sentences" in surveys using desert-related criteria); see also Jonathan Baron & Ilana Ritov, *The Role of Probability of Detection in Judgments of Probability*, 1 J. LEGAL ANALYSIS 553, 582 (2009) (noting that "[p]robes designed to encourage subjects to think about deterrence" increased, to a small extent, subjects' willingness to use consequentialist considerations to mete out punishment).

<sup>24</sup> Robinson & Darley, *Utility of Desert*, *supra* note 11, at 494-97.

<sup>25</sup> *Id.* at 454 (stating that we "ought to assign criminal punishments on essentially just desert grounds").

intuitions and incorporating them into criminal justice policy, they engage in a further step, deciding whether some particular widely-shared intuition is too abstract to promote compliance.

Robinson and Darley would presumably say that intuitions elicited by mock sentencing are more important for generating future compliance than are our more abstract intuitions about the broader goals of sentencing. That certainly might be true. But it is itself an empirical question. When a former rapist is released from prison and subsequently reoffends, people's incapacitationist views about prison might lead them to doubt the appropriateness of existing sentencing policies.

Empirical desert advocates might be accused not only of ignoring intuitions that are too abstract but also of ignoring intuitions that are too particularized. For example, Robinson states that empirical desert "envisions a set of liability and punishment rules to be applied identically to all defendants; it is not the community's view of deserved punishment in a particular case that is relevant here."<sup>26</sup> So, it seems, we ought not develop empirical desert policies by examining reactions to major public events, like the O.J. Simpson trial or the beating of Rodney King. Robinson justifies this limitation, in part, by noting that researchers must control the relevant information that subjects have about a particular case. We cannot meaningfully compare moral intuitions about some case when people have different information about its underlying facts.<sup>27</sup>

But Robinson also poses case scenarios as he does in order to reduce biased responses. Thus, the second way in which empirical desert advocates pick-and-choose among our intuitions is by screening out intuitions that are biased by factors like racism:

[I]n collecting data to construct the rules, real cases, especially publicly known cases, typically are not a useful source. People's

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<sup>26</sup> Robinson, *Competing Conceptions*, *supra* note 13, at 149.

<sup>27</sup> Robinson states:

What one makes of the police testimony in the O.J. Simpson case or the Rodney King case may depend upon how one has come to view police officers from one's daily life experiences. If people draw different conclusions from the testimony, they are likely to have different views of the relevant facts, which predictably results in different views on the liability and punishment deserved.

Robinson, *Empirical Desert*, *supra* note 7, at 34.

views on such cases are commonly biased by political or social context or by other factors such as race, that all would agree have *no proper role in setting principles of justice*. Instead, the community's intuitions of justice are derived from controlled social science studies that determine the factors that influence people's assessment of a violator's blameworthiness, not by asking people about abstract factors but rather by having them "sentence" a variety of carefully constructed variations of cases to see what factors influence their punishment judgments.<sup>28</sup>

If Robinson truly is a consequentialist, however, then he dismisses the effects of racial bias too quickly. From a predictive perspective, racially biased intuitions may tell us a lot about people's compliance with the law. People who have such intuitions are likely to question the law's legitimacy when it *lacks* their biases. Surely such intuitions provide relevant data from a predictive perspective.

Robinson's decision to ignore racist intuitions seems only to make sense if he is using intuitions to *justify* punishment policies. In that case, we would all agree with Robinson that racist intuitions "have no proper role in setting principles of justice."<sup>29</sup> By filtering out biased intuitions on the ground that they cannot be morally justified, however, he seems to shift illicitly from the predictive mode to the justificatory mode.

When we move away from racism to other sorts of biases, the level of abstraction at which we should elicit intuitions becomes even more controversial. Robinson states that "political or social context" can bias our intuitions, but surely some political or social context can be relevant to determining what practices are just. More importantly, once we start to examine the substance of our intuitions to determine whether or not they should play a role in setting principles of justice according to what seem to be non-consequentialist moral criteria, then we should apply those criteria from top-to-bottom, analyzing the justifiability of all of our punishment-related intuitions. Doing so would make empirical desert quite a bit more complicated than it currently purports to be.

Robinson could stay safely in the predictive mode by asserting that intuitions laden with racial, political, or social biases are not likely to promote compliance. The assertion might even be true in the long run, though it would require

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<sup>28</sup> Robinson, *Competing Conceptions*, *supra* note 13, at 149 (emphasis added).

<sup>29</sup> *Id.*

empirical support and further delineation of what is meant by political and social context. In the short term, at least, laws designed to *eliminate* biases are likely to generate non-compliance among those with the biases. So, it is not clear how Robinson can ignore such intuitions in the predictive mode. If Robinson screens out racially, politically, and socially biased intuitions on consequentialist grounds, then he should do so more explicitly. Otherwise, empirical desert seems to hover in a gray area that sometimes focuses on intuitions for predictive reasons and sometimes focuses on them for justificatory reasons.<sup>30</sup>

The third way defenders of empirical desert pick-and-choose among our intuitions is by setting the conditions under which the intuitions are elicited. Robinson and Darley purposefully sanitize the circumstances under which we gather empirical desert data in order to discourage answers that reflect heat-of-the-moment reactions. According to Robinson and Darley:

Basing the criminal law on community standards does not mean resolving individual cases as the public or press see them in the heat of the moment. We know that the public and the press can lose perspective when buffeted by the biases and prejudices inspired by the facts of any particular case. The tendency of people to be more sympathetic to defendants more like themselves is well documented. Nor does our position support legislators' hastily passing laws driven by public reactions to some recent court case that outrages public opinion.<sup>31</sup>

Again, Robinson and Darley seem to be slipping into a justificatory mode. They want us to focus on punishment intuitions gathered in a calmer state. But if they believe that we must focus on such intuitions because they are more likely to be just in some transcendent deontological sense, then they have indeed slipped into a justificatory mode that seems to depart from their otherwise purely consequentialist argument for empirical desert. In that case, it seems once again that we

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<sup>30</sup> There certainly are a variety of consequentialist grounds for opposing racism and other forms of bias. So, Robinson could object to creating biased laws on consequentialist grounds other than just compliance. But as a consequentialist, it would seem better to first measure people's biased intuitions. Then, we would know more about the costs of passing laws that ignore people's firmly-held biases, even if unbiased laws have more benefits overall.

<sup>31</sup> Robinson & Darley, *Utility of Desert*, *supra* note 11, at 488 (footnote omitted).

may as well delve deeper into the substance of the intuitions at stake in order to determine if the intuitions are justified.

Alternatively, Robinson and Darley may discount biased, unreflective intuitions because they believe that a criminal justice system based on such intuitions will not maximally promote long-run compliance. Such a view would remain safely in the predictive mode. Unfortunately, it's not clear that it's true. Real world cases will generate precisely the sorts of outrage, bias, and prejudice that Robinson and Darley seek to exclude when they elicit our intuitions at the experimental stage. Indeed, researchers have found that subjects give more punitive responses to questions about punishment when they are angered than when they are calm.<sup>32</sup> When people decide whether or not to violate the law, they are frequently in states of anger; so from a predictive perspective, we might generate better information about compliance behavior by querying angry subjects. Nevertheless, Robinson and Darley choose to query subjects in calm states, presumably because calmer intuitions are somehow more justifiable than angrier intuitions.

The choice of survey conditions can substantially affect survey responses. When primed with disgusting odors or video clips, subjects find hypothetical bad acts, like lying on a resume, more morally wrong.<sup>33</sup> By contrast, subjects primed with words associated with purity and cleanliness give less severe ratings of wrongfulness.<sup>34</sup> The effect of disgusting stimuli on wrongfulness ratings can be reduced, however, if subjects are made to wash their hands after exposure to disgusting stimuli.<sup>35</sup> When empirical desert researchers elicit intuitions, they need to decide whether to do so with subjects that are angry, calm, disgusted, or comfortable, with hands that have recently been washed or not. Those choices must be justified,

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<sup>32</sup> See Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563, 568 (1998).

<sup>33</sup> See generally Simone Schnall et al., *Disgust as Embodied Moral Judgment*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1096 (2008). For other examples of how our moral intuitions vary based on context, see Donald Braman, Dan M. Kahan & David Hoffman, *Some Realism About Punishment Naturalism*, 77 U. Chi. L. Rev. (forthcoming, 2010) (manuscript at 17-55, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1443552](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443552)).

<sup>34</sup> Simone Schnall, Jennifer Benton & Sophie Harvey, *With a Clean Conscience: Cleanliness Reduces the Severity of Moral Judgments*, 19 PSYCHOL. SCI. 1219, 1219-20 (2008).

<sup>35</sup> *Id.* at 1220-22.

presumably on the grounds that some survey conditions will provide better information about how to increase compliance.

I am not criticizing any of the particular choices made by empirical desert advocates when querying lay intuitions. Rather, I am highlighting the many ways in which the selection of survey questions and conditions will affect survey results. In order to stay true to their consequentialist underpinnings, empirical desert advocates should do more to bolster the consequentialist grounds for their choices of survey questions and conditions.<sup>36</sup>

Finally, empirical desert advocates make implicit decisions about *whose* intuitions to examine. If we were seeking to identify punishment intuitions generally, we could query a random sample of the population. But Robinson and Darley seek to gather information to boost compliance. A random sample of the population will contain relatively few people who are on the fence between offending and not offending, at least with respect to offenses of any seriousness. Making the law consistent with the intuitions of a random sample of survey-takers in the population is unlikely to generate much compliance because most people in the sample would be unlikely to violate serious criminal laws in the first place.<sup>37</sup>

If Robinson and Darley were truly interested in reducing crime, they should focus their inquiries on those who are most likely to be on the fence with respect to compliance. Many of those who actually commit crimes are mentally ill or addicted to drugs, so perhaps Robinson and Darley should focus on these populations. I suspect they do not, however, because though they purport to gather intuitions for *predictive*

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<sup>36</sup> Even if people have widely-shared intuitions of ordinal punishment severity under a variety of conditions of elicitation, empirical desert purports to address a much wider range of intuitions. As to these other intuitions, they will often depend on the conditions of elicitation.

<sup>37</sup> Robinson and colleagues are also concerned with more modest forms of subversion, as when jurors ignore a judge's instructions or when police officers do not follow proper procedures. See Paul H. Robinson, Geoffrey P. Goodwin & Michael Reisig, *The Disutility of Injustice* 42 (Sept. 13, 2009) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1470905](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1470905)) [hereinafter Robinson et al., *Disutility of Injustice*]. If this is the sort of subversion that empirical desert advocates hope to reduce, it is hardly clear that the goal can justify revolutionizing our punishment practices. It's one thing if empirical desert reduces crimes like murder, rape, and burglary but quite another if it merely increases compliance with police procedures and jury instructions. Furthermore, while we generally seek to encourage compliance with such behavioral norms, it is hardly clear that society functions better whenever subversion is reduced. Most consequentialists, I suspect, would seek to optimize rather than minimize rates of subversion.



purposes, in fact, they limit the scope of intuitions gathered to those that are elicited from only certain people under certain conditions that are likely to seem morally *justified*.

To be clear, I am not arguing that empirical desert advocates should query angry, biased, or drug-addicted subjects. Rather, I claim that advocates must defend their choices. If they defend them in the predictive mode, then they should present empirical data showing that laws that square with calmer, unbiased intuitions generate more compliance than laws that square with intuitions elicited under other circumstances.<sup>38</sup> Alternatively, if advocates defend their selection of intuitions in the justificatory mode (which seems doubtful), then they should explain why we filter out only some intuitions that are unjustified but stop short of examining the justification of lay intuitions from top to bottom, including the lay intuition that people should be punished to obtain retribution.

Empirical desert advocates clearly recognize the distinction between using intuitions to predict and to justify.<sup>39</sup> Robinson explicitly states that “[e]mpirical desert can only tell us what people think is just. It cannot tell us what actually is just. In other words, it cannot tell us what an actor ‘deontologically deserves.’”<sup>40</sup> The challenge, though, in responding to the cherry-picking challenge is to make clear that interests in justifying punishment do not accidentally sneak in to the methodology.

## 2. Significance Challenge

Empirical desert advocates are self-avowed consequentialists.<sup>41</sup> As consequentialists, they believe that punishment is justified by its instrumental ability to achieve good ends like crime prevention and prisoner rehabilitation. They care not just about achieving these goals but also about

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<sup>38</sup> Of course, if we had good data on how particular laws affect compliance, we might observe regularities in the data without needing surveys of lay intuitions at all. In a world with better data on the relationship between laws and compliance, empirical desert would likely prove most helpful as a method of generating hypotheses as to which new laws to test first.

<sup>39</sup> Robinson, *Empirical Desert*, *supra* note 7, at 37.

<sup>40</sup> *Id.*

<sup>41</sup> See Robinson & Darley, *Utility of Desert*, *supra* note 11, at 456 (stating that their “arguments for a desert-based system are blatantly utilitarian.”); *id.* (“We give . . . a utilitarian justification for the only non-utilitarian system for allocating punishment.”).

doing so in a cost-effective manner.<sup>42</sup> So, ultimately, empirical desert advocates will have to present evidence, not just that they can increase compliance, but that they can do so in a manner that best promotes all consequentialist goals. The significance challenge says that unless we can estimate how much compliance we will generate by adopting a policy consistent with empirical desert, we won't know if the policy warrants deviating from our ordinary consequentialist policies.

One problem is that, unless we know how much compliance some empirical desert policy will generate, we cannot choose among various competitor policies. To take one important example discussed earlier, Robinson and Darley make much of the fact that people have remarkably consistent intuitions about the comparative blameworthiness of offenses, at least among core crimes “of physical aggression, unconsented-to takings, and deception or deceit in exchanges.”<sup>43</sup> Thus, they note, for a wide range of crimes, we have surprisingly consistent intuitions about their appropriate ordinal punishment severity (the ranking of punishment magnitudes for different crimes).<sup>44</sup>

When it comes to crafting actual policy, however, the significance of this finding may be swamped by another set of punishment intuitions about which laypeople have wide-ranging intuitions. Namely, surveys show that people have quite varied intuitions about the absolute amount of punishment that offenders should receive for committing a particular offense.<sup>45</sup> Given the inconsistency in our intuitions of cardinal punishment severity, it is not surprising that jurisdictions vary considerably in the length of prison sentences they assign to various crimes. Robinson and Kurzban note that “American offenders were required to serve an

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<sup>42</sup> See ANTONY DUFF, *TRIALS AND PUNISHMENTS* 156-57 (1986) (describing essential features of consequentialist punishment).

<sup>43</sup> Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1, at 1880; Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 57.

<sup>44</sup> Empirical desert advocates may overstate the salience of this finding. See Braman, Kahan & Hoffman, *supra* note 33, at 17-20 (arguing that people have divergent punishment intuitions about “victimless” or “vice” crimes and that “the incidence of these crimes greatly outnumbers the incidence of criminal victimizations”).

<sup>45</sup> See Robinson et al., *Disutility of Justice*, *supra* note 37, at 16 (“While people tend to agree on the proper rank order of cases on the punishment continuum, at least for the kind of core harms at issue here, some people tend to be harsh in their ‘sentencing,’ while others are lenient.”); Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1, at 1880-82; Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 9.

average of twenty-nine months after conviction in 1999,” while “the average offender in the Netherlands was released after five months.”<sup>46</sup> Meanwhile, the average Columbian offender was “not released until a startling 140 months”<sup>47</sup> after conviction.

Even if we can increase compliance to some extent by making *ordinal* punishment severity line up with widely-shared intuitions, the compliance bonus we generate might be small relative to the loss of compliance generated when the *cardinal* severity of our punishments is out of line with people’s intuitions. Indeed, it seems unlikely that a person will care very much if the penalty for grand theft is a little higher or lower than the penalty for a minor battery if penalties for all offenses are an order of magnitude higher or lower than where he thinks they should be.<sup>48</sup> Moreover, people are more likely to learn about the absolute magnitude of a punishment in the media than they are to learn about a punishment’s severity relative to the punishment for other crimes.<sup>49</sup>

Robinson argues that our punishments should line up with widely-shared ordinal punishment intuitions. An alternative strategy, however, is to make our punishments line up, to the extent possible, with everyone’s not-widely-shared absolute punishment intuitions. Whichever strategy is better can only be determined by having some sense of how deviations from ordinal punishment intuitions affect compliance relative to deviations from cardinal punishment intuitions, something we cannot assess well from social science surveys of people’s intuitions. Similarly, empirical desert policies that require us to spend additional resources are only warranted if they promote compliance better than alternative policies, like

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<sup>46</sup> Robinson & Kurzban, *Concordance and Conflict*, *supra* note 1, at 1882.

<sup>47</sup> *Id.*

<sup>48</sup> See Sigler, *supra* note 7, at 40 (recognizing that we care about absolute proportionality at least as much, if not more so, than relative proportionality).

<sup>49</sup> See Robinson et al., *Disutility of Injustice*, *supra* note 37, at 50 n.158 (“[M]edia tend[] to focus on the absolute amount of punishment imposed rather than upon the relative amount of punishment among different cases.”); *see also id.* at 32 (“It is often the case that voters are only informed about the duration of sentences assigned in specific cases . . . .”); *id.* at 32-33 (“[M]ost of the crime stories in newspapers are relatively brief and commonly report the sentence given, but generally omit or gloss over the reasoning that lies behind the assigned sentences.”); *id.* at 33 (“It appears likely that media accounts of crimes are the source that voters generally use to form their judgments on courtroom sentencing.”). More generally, empirical desert is likely to have little impact on compliance if laypeople are not even exposed to information about how the law deviates from their intuitions. See Slobogin, *supra* note 20, at 326.

training or hiring police officers to promote better partnerships with communities.<sup>50</sup>

A second problem is that even if we could decide which empirical desert strategy would best promote compliance, we would have no grounds for implementing it, unless it fits well in a consequentialist calculus.<sup>51</sup> Suppose, for example, that we can make our punishments more consistent with empirical desert by raising the typical sentence for some offense by one year. Unless we can estimate the amount of compliance we are likely to gain, we won't know if the compliance benefit outweighs the cost of incarcerating offenders for the additional year. Similarly, if we can make our punishments more consistent with empirical desert by reducing the typical sentence for some offense by one year, we won't know if the compliance benefit outweighs the loss of incapacitation and rehabilitation we would have had if we maintained the status quo policy. These sorts of determinations are difficult to make absent data about induced compliance.

Robinson recognizes that empirical desert cannot tell the whole story about appropriate punishment. He notes, for example, that a deviation from empirical desert "might so clearly provide a crime-control bonanza that any criminogenic effect from undermining the system's moral credibility would be outweighed by the deviation's crime-control benefits."<sup>52</sup> But he treats such occasions as highly exceptional, claiming that we "ought to assign criminal punishments on essentially just desert grounds."<sup>53</sup> In other words, Robinson defends the unconstrained adoption of empirical desert so long as we are open-minded about occasional deviations. But if empirical desert adds just a modest compliance bonus, we are not justified in adopting it wholesale, unless we understand its effects relative to other consequentialist goals.

Robinson recognizes that "our current knowledge regarding [the crime-control benefits of empirical desert] is

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<sup>50</sup> See Slobogin, *supra* note 20, at 326 (noting that compliance may depend on respect for those with legal authority, as well as the laws they enforce).

<sup>51</sup> See Simons, *supra* note 18, at 641 (stating that it is unclear if the benefits of empirical desert "are sufficiently large to outweigh the utilitarian costs of securing correspondence between community values about just deserts and the content of the criminal law"); see also *id.* at 661.

<sup>52</sup> Robinson, *Empirical Desert*, *supra* note 7, at 38.

<sup>53</sup> Robinson & Darley, *Utility of Desert*, *supra* note 11, at 454; see also *id.* at 498 ("We conclude that desert distribution of liability happens to be the distribution that has the greatest utility, in the sense of avoiding crime. Thus, utility theorists ought to support liabilities assigned according to such a desert-based system.").

limited and that more research would be extremely valuable.”<sup>54</sup> Nevertheless, he does “not believe that we need wait for [the research] before preferring empirical desert” to its competitors.<sup>55</sup> According to Robinson, empirical desert “can be readily operationalized—its rules and principles can be authoritatively determined through social science research into peoples’ shared intuitions of justice.”<sup>56</sup>

On the contrary, however, we cannot use social science surveys alone to determine how much compliance empirical desert will generate. To do that, we would have to engage in the very difficult process of monitoring and analyzing the effects that empirical desert policies have on compliance behavior. We can use surveys to test short-term effects of people’s beliefs about the law on their reported willingness to comply with the law. But such studies will still be a far cry from delivering the sort of real-world data we would need in order to estimate compliance induced by real-world empirical desert policies. Therefore, we cannot operationalize empirical desert as part of a consequentialist punishment system until we can better estimate how much compliance empirical desert policies induce.<sup>57</sup>

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<sup>54</sup> Paul H. Robinson, *Reply*, in CRIMINAL LAW CONVERSATIONS, *supra* note 7, at 61, 63 [hereinafter Robinson, *Reply*].

<sup>55</sup> *Id.* But cf. Michael T. Cahill, *A Fertile Desert?*, in CRIMINAL LAW CONVERSATIONS, *supra* note 7, at 43, 43-44 (raising questions about the ability of empirical desert to generate compliance).

<sup>56</sup> Robinson, *Empirical Desert*, *supra* note 7, at 29.

<sup>57</sup> As this article neared publication, Robinson and colleagues released a draft paper that provides some evidence about how exposure to policies that deviate from lay intuitions may affect behavior. See Robinson et al., *Disutility of Injustice*, *supra* note 37. They studied subjects who were asked to envision themselves living in a hypothetical jurisdiction that handed down several sentences that sharply diverge from lay intuitions. The sentencing decisions said to be from the hypothetical jurisdiction were, in fact, aggregated from real U.S. jurisdictions, and subjects were so informed. *Id.* at 45, 48. The researchers found that exposure to the sentencing information led subjects to report a higher likelihood of disobeying certain behavioral norms (not necessarily criminal law violations) in the hypothetical jurisdiction. *Id.* at 50.

While the research is a step in the right direction, it does not come close to providing sufficient reason to implement empirical desert and certainly does not enable us to operationalize it. I will briefly mention just three reasons why. First, the research focuses principally on subversive rather than criminal behavior, and it is far from clear that subversive behavior should be minimized rather than optimized. Second, we do not know how closely survey responses reflect actual behaviors. We are understandably skeptical that short-term exposure to genuine information about sentencing will have much of a long-term effect on compliance. After all, if such short-term exposure really increased people’s likelihood of violating behavioral norms, we might be troubled by the conduct of the research itself or at least require greater precautions to undo its deleterious effects (given that the research acknowledged using actual U.S. cases). Third, in the real world, many people have even less exposure to sentencing

Robinson argues that empirical desert can be operationalized at least as easily as its competitors.<sup>58</sup> But empirical desert is a form of consequentialism. So empirical desert cannot be operationalized if consequentialism cannot. Even if increasing some penalty will generate compliance by making the penalty better align with widely-shared intuitions, we cannot say that the higher penalty is cost effective unless we have some sense of how much compliance the increased penalty will generate. There may be narrow circumstances where empirical desert can be helpful even with limited information, but wholesale adoption of empirical desert principles requires much more data on induced compliance.

The bottom line is that if empirical desert truly is a form of consequentialism, then it has to address a variety of consequentialist punishment goals. To do that, it must yield predictions about the magnitude of compliance some policy can be expected to induce, so we can compare that effect to other expected consequences of the policy. The significance challenge emphasizes that until empirical desert advocates can better quantify the effects on compliance of conforming to or deviating from widely-shared intuitions, we will know little about how much impact widely-shared intuitions should have on our consequentialist punishment policies and whether empirical desert should be a guiding light or just an important, though somewhat nebulous, factor to consider.

### 3. Exploitation Challenge

Even though empirical desert seems best understood as a consequentialist approach to punishment, Robinson has tried to make empirical desert appeal to retributivists, too. According to Robinson, retributivists may find that “empirical desert will produce far more deontological desert than any other workable principle that could or would be adopted.”<sup>59</sup> Yet,

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information than did the study subjects and are unlikely to be exposed to so many cases with outcomes that diverge so substantially from lay intuitions. Deviations from lay intuitions cannot reduce compliance unless people are consciously or unconsciously exposed to information that reveals the deviations.

<sup>58</sup> Robinson, *Reply*, *supra* note 54, at 63.

<sup>59</sup> Robinson, *Empirical Desert*, *supra* note 7, at 29. Elsewhere, Robinson has made the pitch more modestly: “The best that can be said about it deontologically is that [empirical desert] may produce something less in conflict with deontological desert than would the more traditional instrumentalist distributive principles, such as general deterrence, incapacitation of the dangerous, or rehabilitation.” Robinson, *Reply*, *supra* note 54, at 61.

I suspect that many retributivists would take issue with this claim. They may say that if you purposely or knowingly punish in excess of true deontological desert, you are not producing a lot of retributive justice; you are producing no justice at all. Moreover, if appropriate punishment requires us to punish people for deontological *reasons*, then an empirical desert punisher, motivated by consequentialist principles, may be imposing *no* deontological desert whatsoever.

But even if retributivists are sympathetic to Robinson's claim about the *amount* of deontological desert created by empirical desert, I raise here a different challenge. Namely, retributivists may be concerned that empirical desert seeks to gain compliance from the general public by exploiting laypeople's desert intuitions in order to achieve consequentialist ends. According to this exploitation concern, empirical desert advocates are accommodating the preferences of laypeople, not because they believe that laypeople are likely to know what punishments are just but rather because empirical desert advocates can take advantage of laypeople's beliefs in order to distribute punishment according to what empirical desert advocates take to be the real (consequentialist) principles of punishment.

The exploitation concern arises from the fact that empirical desert only induces compliance when laypeople make a certain questionable inference. According to Robinson and Darley, "citizens in general regard the law as a credible guide to how they ought to behave."<sup>60</sup> In borderline cases, "community members are more likely to give deference to the commands of the criminal justice system if the system is morally authoritative."<sup>61</sup> But does empirical desert lead to more morally authoritative laws in the eyes of laypeople? If Robinson and Darley are right that people understand what is "morally authoritative" in retributive terms, the answer is no. As Robinson states, empirical desert "cannot tell us what an actor 'deontologically deserves.'"<sup>62</sup> So, whether laypeople are conscious of it or not, the compliance induced by empirical desert happens through an irrational or non-rational process. There is no good reason why empirical desert should induce

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<sup>60</sup> Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 30.

<sup>61</sup> *Id.* at 29.

<sup>62</sup> Robinson, *Empirical Desert*, *supra* note 7, at 37.

compliance among laypeople if they are true retributivists.<sup>63</sup> Retributivists should not be swayed by aggregate data about other people's intuitions unless they have reasons to trust other people's views about justice more than their own. By crafting policies with the aura of deontological legitimacy in order to take advantage of an irrational or non-rational cognitive process, empirical desert is arguably exploitative.

If you have consequentialist leanings, you are not likely to be troubled by the exploitation concern. There are two reasons, however, why such exploitation raises problems for empirical desert. The first is that exploitation may itself offend principles of legitimate government. Some theorists, especially the deontologically-minded retributivists to whom Robinson appeals, may find it inappropriate for the government to obtain undeniably good results if it must do so through misleading processes.

To illustrate, suppose that public health bureaucrats determine that we can ease people's back pain by providing free "medical" bracelets. The bracelets have no special properties but have been found to ease chronic suffering through a placebo effect. May we distribute the bracelets along with misleading information that the "medical" bracelets heal back pain? On the one hand, the bracelets really do relieve pain quite inexpensively and that's a great public good. On the other hand, the bracelets achieve the beneficial effect by creating the impression that they have pharmacologically-active properties. If we told people that the bracelets were quite ordinary, they would not work as well.

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<sup>63</sup> In this section, I take at face value Robinson and Darley's claim that laypeople have retributive punishment intuitions. To the extent that they, in fact, have consequentialist punishment intuitions or only have limited retributive intuitions, then they may have quite rational motivations for endorsing empirical desert. For example, it is quite possible that laypeople have clear retributive views about particular instances of punishment but not about how we should justify punishment more generally. If so, policies consistent with empirical desert would not run counter to laypeople's underlying beliefs about justification, and the exploitation concern would be weak or non-existent.

While it is not clear if laypeople care about the underlying justification of our punishment policies, Robinson at least suggests that laypeople care about more than just the magnitude of sentences we impose. See Robinson et al., *Disutility of Justice*, *supra* note 37, at 50-51 ("[W]hat we know about making and keeping reputations tells us that the [criminal justice] system's intention regarding doing justice counts enormously. While accidental or unavoidable injustices or failures of justice may be forgiven, if the system seems committed to trying to do justice, when revealed deviations from desert are intended by the system . . . then even a single telling case can have detrimental consequences.").



Empirical desert may function like the placebo bracelets. If empirical desert works, it achieves an indisputable public good—the reduction of crime. But it achieves the public good by creating the impression that the criminal law has the sort of deontological legitimacy that laypeople purportedly desire. So, one might argue, empirical desert exploits people's perceptions of the law's legitimacy to accomplish a goal that is inconsistent in certain ways with their underlying intuitions of justice.<sup>64</sup>

Perhaps such exploitation is justified on consequentialist grounds. Maybe we are permitted to be less than forthcoming in order to obtain good effects. But to the extent that empirical desert advocates seek to appeal to deontologically-minded retributivists, they have to explain what justifies such exploitation according to deontological, not consequentialist, principles.

A second reason why the exploitation concern may be problematic is that it has the potential to undermine empirical desert itself. If empirical desert induces compliance through an irrational or non-rational process, the connection may not stand up to public scrutiny. For example, Robinson and Darley state that “[w]ithout knowing quite why insider trading is morally wrong, most of us accept the conclusion that it is wrong, because the relevant authorities have thought about it, and assert it is wrong.”<sup>65</sup> But if laypeople are retributively-minded as Robinson and Darley say they are, laypeople presumably believe that the relevant authorities punish insider trading because it *deserves* punishment and not because punishing insider trading has good consequences. Yet if Robinson and Darley have their way, the relevant authorities would ultimately punish insider trading because doing so has good consequences. Such an approach, one suspects, may not sit well with retributively-minded laypeople.

A layperson may complain, “I thought you punished my loved one for insider trading because there was something morally wrong with his behavior. Now, however, I see what really happened: you found some sociological surveys showing

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<sup>64</sup> As Ken Simons has argued, it follows from the views of Robinson and Darley that the “[g]overnment should, in principle, expend resources to deceive people into believing that the system is just (e.g. by suppressing information about injustices) if this would be cheaper than expending resources to improve the actual justice of the system.” Simons, *supra* note 18, at 660.

<sup>65</sup> Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 30.

that you can boost compliance with other laws by punishing him in accord with people's uninformed, automatic intuitions." In other words, the very methodology of empirical desert may be inconsistent with the way that laypeople believe that punishment should be distributed. Empirical desert may be partially self-defeating.

We could ask laypeople if it is better to establish a punishment scheme according to empirical desert principles or according to traditional retributivist principles. To my knowledge, no one has investigated this particular question. But given that laypeople are said to have desert-oriented intuitions, perhaps they have the intuition that a punishment scheme founded on empirical desert is not generally just.

To more convincingly show that empirical desert truly captures intuitions of justice, empirical desert advocates could test intuitions related to empirical desert itself.<sup>66</sup> If laypeople have intuitions that are consistent with empirical desert, then we would have little to worry about. But suppose instead that laypeople believe that offenders should receive the punishment they deserve based on a more timeless conception of desert that squares with considered, reflective judgment. If so, we might expect laypeople to find unattractive a criminal justice system that is overtly based on empirical desert. After all, it's one thing to think that an offender received a particular term of incarceration because such was the conclusion of a team of criminal justice experts. It's quite another to think that the term of incarceration was determined by averaging the widely-shared intuitions of people with no specialized knowledge or experience with the criminal justice system.<sup>67</sup>

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<sup>66</sup> Robinson denies that we have intuitions about such matters. Robinson states, "Kolber *imagines* that lay persons have intuitions about all sorts of things other than deserved punishment, such as the societal goals of punishment." Robinson, *Reply*, *supra* note 54, at 62 (emphasis added). Contra Robinson, there is no question that we have intuitions about all sorts of issues, including societal goals of punishment. Robinson may be right that our views about broad societal goals are overlayed with "reasoned judgments," in ways that make them different than the sorts of intuitions that are *his* central focus. See Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 4-8. But good consequentialists must still be interested in intuitions that are overlayed with reasoned judgments. After all, when a person decides whether or not to break the law, his behavior depends not only on his steadfast, automatic intuitions but also on his strongly-held, even if more flexible, reasoned judgments.

<sup>67</sup> Alice Ristroph challenges empirical desert from a different direction. She writes that it "seems doubtful that sentencing policies based on the laboratory findings of social scientists will be perceived as *more* legitimate than policies chosen by the ordinary democratic process." Alice Ristroph, *The New Desert*, in CRIMINAL LAW CONVERSATIONS, *supra* note 7, at 45, 49. Of course, the policies of empirical desert still require approval through the democratic process, so Ristroph is presumably suggesting

If laypeople would report finding the empirical desert approach to punishment less attractive than other methods of distributing punishment, then empirical desert counsels us to conform the criminal justice system to laypeople's intuitions. If those lay intuitions are contrary to empirical desert, then empirical desert counsels us not to use a system of empirical desert!

Robinson rejects this possibility, claiming that laypeople do not care about the difference between empirical desert's consequentialist aims and their own deontological aims. According to Robinson:

[F]rom the layperson's point of view, empirical desert *is* deontological desert, both in its distribution and its motivation. [Laypeople] will see no difference between the two. An empirical desert distribution of punishment to them is exactly what true justice requires. Even if you showed people the empirical studies, their reaction is likely to be a so-what shrug. It's all very nice that these psychology studies show that criminal law is doing justice as the community sees it, they might say, but what matters to me is that the system really is doing justice.<sup>68</sup>

Yet, empirical desert is most assuredly not really doing justice as the community sees it if the community understands justice deontologically. True, laypeople may never come to recognize the differences. But if what matters to laypeople is, as Robinson says, that "the system really is doing justice," then laypeople may be misled by empirical desert because, as discussed, the "desert" aspect of empirical desert is essentially a facade. Deontological desert plays no direct justificatory role in empirical desert, just as it plays no direct role in traditional descriptions of consequentialism.<sup>69</sup>

Rather than denying that there is any meaningful difference between the lay conception of justice and the empirical desert approach, empirical desert advocates could just stick to their consequentialist guns. They could simply recognize that there is a difference between the lay conception of justice and empirical desert but argue that this particular

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that a straightforward empirical desert methodology is, in some sense, outside the *ordinary* democratic process.

<sup>68</sup> Robinson, *Reply*, *supra* note 54, at 62.

<sup>69</sup> There are non-traditional versions of consequentialism, however, that do give a more fundamental role to deontological desert, as discussed in MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 155-59 (1997) and in Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 833-36 (2007).

violation of lay intuitions is unlikely to have much effect on compliance. Even if laypeople reject empirical desert as an overarching theory of punishment distribution, this particular aspect of lay intuitions can, perhaps, be safely ignored. To this extent, a “so-what shrug”<sup>70</sup> from consequentialists may be appropriate.

But even if the effect on compliance is small, defenders of empirical desert may still have reasons to hide empirical desert from laypeople. Once one accepts the compliance claim—the central tenet of empirical desert that people are more likely to comply with a criminal justice system that matches their intuitions—then, arguably, we can control crime even more efficiently if people *believe* that our system of punishment is based on traditional deontological principles rather than the consequentialist principles that Robinson and Darley actually use to support empirical desert.

Whatever one thinks about traditional notions of desert, we may very well encourage more respect and compliance in a community that erroneously believes we use traditional desert principles than in a community that believes we use consequentialist principles of empirical desert. Admittedly, this is an empirical question. However, it closely matches the empirical claim that underlies empirical desert, namely, that people comply more with a punishment system that comports with their moral intuitions.

To some influential theorists, like Immanuel Kant and John Rawls, no acceptable moral theory can advocate its own secrecy.<sup>71</sup> Such theorists defend a “publicity condition,” which requires that a system of morality be based on principles that can be announced publicly without thereby undermining those same principles.<sup>72</sup> Lots of consequentialist theories scrape up against the publicity condition,<sup>73</sup> but the issue is particularly acute for Robinson and Darley because they seem to have already endorsed a version of the publicity condition. They state that hiding government operations that are perceived as unjust “would be hard to do without breaching notions of press

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<sup>70</sup> Robinson, *Reply*, *supra* note 54, at 62.

<sup>71</sup> See, e.g., IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* 185 (M. Campbell Smith trans., 1795); JOHN RAWLS, *A THEORY OF JUSTICE* 130, 133 (1971). But see HENRY SIDGWICK, *THE METHODS OF ETHICS* 489-90 (7th ed., Hackett 1966) (1893).

<sup>72</sup> See generally David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* 154 (Robert E. Goodin ed. 1996).

<sup>73</sup> *Id.* at 166-68.

freedom and government transparency to which liberal democracies aspire.”<sup>74</sup> Thus, the publicity condition may create more trouble for Robinson and Darley than for most consequentialists because they seem to endorse non-consequentialist limitations on methods of obtaining compliance.

I do not believe that concerns about the publicity condition are devastating for empirical desert theorists. At least certain forms of beneficent deception should be permissible.<sup>75</sup> Still, empirical desert could strengthen its foundations by empirically testing whether laypeople find empirical desert itself to be an appealing approach to punishment likely to garner their respect and compliance and, if not, explaining whether empirical desert endorses a publicity condition or is willing to mislead laypeople in order to better promote consequentialist goals. Robinson and Darley have made a point of arguing that we cannot modify certain widely-shared lay intuitions without engaging in coercive practices that are inconsistent with modern liberal democracies.<sup>76</sup> They might reasonably be asked whether we are permitted to hide the mechanisms of empirical desert or whether doing so involves an inappropriate form of exploitation or secrecy.

#### CONCLUSION

I have argued that we can use widely-shared moral intuitions to generate predictions about human behavior that help achieve public policy goals. When doing so, however, the intuitions play no direct role in justifying the policies. When empirical desert advocates work within this predictive mode, they may effectively support consequentialist goals that they have already settled on for other reasons.

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<sup>74</sup> Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 2.

<sup>75</sup> See Adam J. Kolber, *A Limited Defense of Clinical Placebo Deception*, 26 YALE L. & POL’Y REV. 75 (2008) (arguing that we should not categorically prohibit physicians from using placebo treatments deceptively); cf. Michael M. Grynbaum, *The Secret New York Minute: Trains Late by Design*, N.Y. TIMES, Oct. 16, 2009 (stating that, according to a policy generally kept secret, trains depart New York City one minute later than their publicly-posted departure times to give riders more time to board); *Authorities: ‘Balloon Boy’ Incident Was A Hoax*, CNN.COM, Oct. 18, 2009, <http://www.cnn.com/2009/US/10/18/colorado.balloon.investigation/index.html> (describing how law enforcement officials lied to the media in order to give crime suspects the false impression that the police still believed their story).

<sup>76</sup> See Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 11, 55-56.

Despite suggestions to the contrary, empirical desert advocates do not attend to intuitions of justice in any grand sense. They seek only to capture a subset of our justice-related intuitions that are somewhat abstract and taken during calm social science surveys rather than our more heated, spur-of-the-moment punishment intuitions. Empirical desert advocates should make clear that there are consequentialist reasons for limiting the inquiry into intuitions in this way, otherwise they risk slipping into the justificatory mode.

Even when safely ensconced in the predictive mode, empirical desert advocates should recognize that the very acts of formulating and promulgating policies have ethical implications. If the goals of those policies are more effectively achieved by hiding the underlying policies, then empirical desert advocates ought to respond to concerns that their approach may sometimes recommend violating publicity requirements. As a whole, consequentialists are unlikely to be troubled by violations of the publicity condition. To the extent that empirical desert tries to appeal to theorists of all persuasions, however, quite a bit may turn on whether or not empirical desert violates the condition.

The aims of empirical desert are vitally important to consequentialist punishment. Lots of policies that may at first seem justified by consequentialism are likely not to be when we consider how those policies may be at odds with widely-shared views of what is fair and just. Any real-world consequentialist must take such second-order effects into account. Empirical desert is an important attempt to do so, and one that can do so even better by distinguishing more clearly between the predictive and justificatory uses of widely-shared moral intuitions, by gathering more empirical data about the effects on compliance of deviating from intuitions, and by responding to concerns about exploitation and the publicity condition.